Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THOMAS ROWE SCHWARZ,
Petitioner,

v.

HONORABLE GERALD KOGAN, Chief Justice of the Florida Supreme Court; and FLORIDA BAR FOUNDATION,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The decision of the United States Court of Appeals for the Eleventh Circuit, review of which is sought, directly concerns the sole federal issue raised in this petition requiring reversal, remand, and new trial on the merits before a district judge not a member of The Florida Bar, namely:

The failure of the magistrate and district judges for the Northern District of Florida to disqualify themselves under 28 U.S.C., Sec. 455 (a)(b) from determining petitioner's complaint, the gravamen of which involved Florida Supreme Court Rule 4-6.1 (Rules Regulating The Florida Bar) making those judges the beneficiaries of an exemption, not accorded to all other Florida law licensees, from voluntarily contributing $350.00 annually to a legal aid organization for the poor as a matter of professional honor and, further, from reporting whether or not such contribution had been made under threat of disciplinary action.

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Decision Below	1
Jurisdiction	1
Statutory Provisions At Issue	1
Statement of the Case	1
Question Presented for Review	2
Reasons For Granting the Writ	3
I. The Decision Of The Eleventh Circuit Court of Appeals Conflicts With The Decisions Of This Court And Other Circuit Courts of Appeals	3
Conclusion	6

Appendix:

Appendix A -- Opinion of the United States Court of Appeals for the Eleventh Circuit, January 12, 1998	A-1
Appendix B --Complaint For Declaratory Judgment And For Injunction	A-17
Appendix C -- Motion For Disqualification Under 28 U.S.C. 455(b)	A-34
Appendix D -- United States District Court for the Northern District of Florida, Order Directing Entry of Judgment, August 9, 1996	A-40
Appendix E -- Judgment of the United States Court of Appeals for the Eleventh Circuit, January 12, 1998; Order Denying Rehearing, February 24, 1998	A-42

TABLE OF AUTHORITIES

Page(s)

Cases:

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) 4,5

Potashnick v. Port City Const. Co., 609 F.2d 1101 (CCA 5, 1980) 4,5

SCA Services, Inc. v. Morgan, 557 F.2d 119 (CCA 7, 1977) 4,5

United States v. Ritter, 540 F.2d 459 (CCA 10, 1976) . 4,5

Statutes and Laws:

28 U.S.C. Sec. 455(a)(b) 1,2,3

28 U.S.C. Sec. 1254 1

Florida Supreme Court Rule 4-6.1 (Rules Regulating The Florida Bar) 1,4,5

DECISION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, review of which is sought, is reported as *Schwarz v. Kogan,* ___ F.3d ___ (CCA 11, 1998).

Treatment of the issue presented for review is found only in footnote 5, final paragraph, page 1229. The opinion and decision, in its entirety, is reproduced and attached as Appendix A to this petition.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C., Sec. 1254.

STATUTORY PROVISIONS AT ISSUE

The federal statutory provisions at issue in this case are 28 U.S.C., Sec. 455(a)(b).

STATEMENT OF THE CASE

This cause originated in June 1994 with petitioner's filing of a pro se complaint in the United States District Court for the Southern District of Florida alleging, inter alia, that Rule 4-6.1 of The Rules Regulating The Florida Bar, as promulgated by the Florida Supreme Court, denied him equal protection through the unequal treatment of law licensees. (Appendix B). On an opposed 1404 motion to transfer by defendant, the case was thereafter transferred to the Northern District of Florida.

Over objection, the Florida Bar Foundation was permitted to intervene.

On grounds that all judges of the Northern District of Florida were the beneficiaries of an arbitrary exemption from the impact of Rule 4-6.1 as Florida law licensees, and the exemption having formed one of the principal bases of petitioner's district court action, a motion supported by memorandum under 28 U.S.C., Sec. 455(b) was filed by petitioner for disqualification of all such judges. The district judge denied the relief sought and an appli-

cation to the Eleventh Circuit for mandamus or prohibition was similarly denied. (Appendix C).

In December 1995 the magistrate judge filed a report and recommendations to the district judge, petitioner lodged objections, and the matter was fully submitted to the district court in January 1996.

On August 8, 1996 the district judge entered an order adopting "de novo" the magistrate judge's recommendations. The order granted defendants' joint summary judgment motion, denied petitioner's motion for summary judgment, and directed the district court clerk to enter judgment in favor of defendant and defendant/intervenor. The judgment was entered on August 12, 1996. (Appendix D).

Petitioner timely appealed to the Eleventh Circuit on September 9, 1996. That court entered its opinion and decision on January 12, 1998, rehearing denied February 24, 1998. (Appendix E).

This petition for certiorari follows.

QUESTION PRESENTED FOR REVIEW

The decision of the United States Court of Appeals for the Eleventh Circuit, review of which is sought, directly concerns the sole federal issue raised in this petition requiring reversal, remand, and new trial on the merits before a district judge not a member of The Florida Bar, namely:

The failure of the magistrate and district judges for the Northern District of Florida to disqualify themselves under 28 U.S.C., Sec. 455 (a)(b) from determining petitioner's complaint, the gravamen of which involved Florida Supreme Court Rule 4-6.1 (Rules Regulating The Florida Bar) making those judges the beneficiaries of an exemption, not accorded to all other Florida law licensees, from voluntarily contributing $350.00 annually to a legal aid organization for the poor as a matter of professional honor and, further, from reporting whether or not such contribution had been made under threat of disciplinary action.

REASONS FOR GRANTING THE WRIT

The sole issue raised in this petition is the broad, overriding public interest in promoting and maintaining, through the application of 28 U.S.C., Sec. 455(a)(b), public confidence in the integrity of the judicial process by eliminating the appearance of as well as actual bias, prejudice, and conflicting interest in federal judges before whom cases have been brought.

The failure of the lower court judges in this case to disqualify themselves upon timely application therefor directly conflicts with the principles enunciated in decisions of this Court, the 5th, 7th, and 10th Circuits and, in late April 1998, an as yet unreported decision of the 11th Circuit itself.

The matter of bias, prejudice, and conflicting interest on the federal bench, or the appearance of same under 28 U.S.C., Sec. 455(a)(b), is one of compelling public importance and is increasingly drawing the attention of the court, lawyers, and media.[1]

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

The interests of the Florida law licensee judges to whom the case below was assigned on both the trial and appellate levels, and the ensuing appearance of bias as a result, do not grow out of any personal activities or personal relationships between those judges and the respective parties. Extensive examination of such personal elements and activities, as it affects judges of whom recusal was sought, accounts for much of the length of the

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[1] Among many others, The Wall Street Journal of January 15, 1997 and, most recently, the Miami Herald of April 24th and 25th, 1998, have highlighted the growing number of federal judges who should have, but failed to (as here) disqualify themselves in the face of actual or the appearance of bias, prejudice, or conflicting interest.

opinions in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (CCA 5, 1980); *SCA Services, Inc. v. Morgan*, 557 F.2d 119 (CCA 7, 1977); and, *United States v. Ritter*, 540 F.2d 459 (CCA 10, 1976). To that extent, such opinion treatment is not here relevant.

In this case, the interest of the judges whose recusal was sought is fixed by the specific provisions of impugned Florida Supreme Court Rule 4-6.1 (The Rules Regulating The Florida Bar). It is unrelated to the judges' personal activities. The exemption of those judges, as Florida law licensees, from the reach of that Rule, forms the basis of petitioner's claim of equal protection violation; the Rule affects all other Florida law licensees, including petitioner.

The specific discriminatory benefit to those judges is found in the exemption which the Rule carves out in their favor from its exhortation to the voluntary professional obligation applicable to all other Florida law licensees: The annual contribution of $350.00 to a legal aid service to the poor and the concomitant obligation of publicly reporting the same, subject to disciplinary action for failure to report compliance or noncompliance with that exhortation.

The order denying recusal in the district court below, and the ten-page opinion of the Eleventh Circuit, fail to treat the exemption as it relates to reporting whether, vel non, the Florida law licensees judges made a $350.00 contribution to a legal aid service organization. Neither do they treat or so much as adumbrate a logical relation of that exemption to the definitive Rule purpose of aiding the poor in their access to the courts. To the contrary, the exemption in fact eliminates encouragement of such contributions by some five to ten thousand individual Florida law licensees,, aggregating potential contributory sums of $1.75-million to $3-million annually, thus reducing advancement of the stated Rule objective of assisting the poor.

As a basis for recusal, the interests of the Florida law licensee judges below in preservation of the impugned Rule exemption in their favor have been ignored below except as trivialized in the Eleventh Circuit's opinion and decision[2] at footnote 5, page 1229. It was neither mentioned nor insinuated in the district court decision. The absence of any consideration to the appearance of interest, and the attendant appearance of bias, pretermits the "reasonable man" limitation imposed upon a judge faced with a disqualification application. It is a failure which conflicts with and substantially impacts the public perception of the federal court system's fundamental integrity, as *Liljeberg, Potashnick*[3], *SCA Services,* and *Ritter,,* supra, and the yet unreported late April 1998 decision of the Eleventh Circuit itself disqualifying District Court Judge K. Michael Moore on "appearance of justice impartiality and objectivity" grounds, all make abundantly clear.

Significantly, the requirement of disqualification has not been limited even when courts have been confronted with the inconvenience arising out of the necessary appointment of a federal judge from outside the specific district to try a case, as illustrated by *Ritter,* supra.

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[2] Authored by a Florida law licensee judge whose recusal would similarly have been appropriate.

[3] In *Potashnick,* district judge William Stafford, the trial judge below in this case, was reversed on the issue of recusal.

CONCLUSION

Disqualification of judges sitting in a case as this should be required where, as Florida Supreme Court law licensees, they are the recipients of a specific benefit not available to all other such licensees. A judge called upon to hear and decide the constitutional propriety of a benefit to himself/herself perforce creates a public impression reasonably questioning impartiality. Maintenance and perpetuation of public confidence in the integrity of the judicial system is a matter neither to be ignored nor submerged.

After more than fifty years of the licensed practice of law in many different courts in numerous roles, petitioner still constitutes an informed member of the general public. It is in that capacity in which he feels the sting generated by the appearance of a lack of impartiality evidenced by the facts of the within case.

Petitioner prays that this Court issue its writ to the United States Court of Appeals for the Eleventh Circuit, review its decision, require disqualification of the Florida law licensee judges who tried and decided this case, reverse the decision accordingly, and remand the cause with instructions to grant a new trial on the merits before a non-Florida law licensee federal judge.

Respectfully submitted,

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By: Thomas Rowe Schwarz

Dated: May 18, 1998

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 96-3276

Thomas Rowe SCHWARZ,
Plaintiff-Appellant,

v.

Gerald KOGAN,
Defendant-Appellee,

Florida Bar Foundation,
Defendant-Intervenor-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

Jan. 12, 1998

Before TJOFLAT, BIRCH and MARCUS*, Circuit Judges.

MARCUS, Circuit Judge:

This lawsuit arises out of a rule of professional responsibility enacted by the Supreme Court of Florida for the purpose of regulating the conduct of members of the Florida Bar. The rule, in pertinent part, requires Bar members to report their compliance with certain aspirational goals regarding the provision of legal services to the poor. Plaintiff-Appellant Thomas Rowe Schwarz, an attorney and member of the Florida Bar proceeding *pro se,* filed this action against the Chief Justice of the Supreme Court of Florida, essentially seeking declaratory and injunctive

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* Honorable Stanley Marcus was a U.S. District Judge of the Southern District of Florida sitting by designation as a member of this panel when this appeal was argued and taken under submission. On November 24, 1997 he took the oath of office as a United States Circuit Judge of the Eleventh Circuit.

relief precluding enforcement of the rule. Schwarz asserts, among other things, that the rule denies him rights guaranteed by the Equal protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution. The district court granted a motion for summary judgment filed by Defendant-Appellees Gerald Kogan (the current Chief Justice of the Florida Supreme Court) and the Florida Bar Foundation. Schwarz now appeals that decision, and asks us to vacate the order and remand with instructions to enter summary judgment in his favor. For the reasons stated below, we find his argument unconvincing, and therefore affirm the district court's rulings.

I.

This appeal concerns Rule 4-6.1 of the Rules Regulating the Florida Bar. The Rule, which is captioned "*Pro Bono* Public Service," was adopted by the Florida Supreme court in June of 1993 after a lengthy review and comment process, pursuant to is exclusive jurisdiction "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Fla. Const. art. V, § 15. Section (a) of the Rule reads as follows:

> Each member of The Florida Bar in good standing, as part of that member's professional responsibility, should (1) render *pro bono* legal services to the poor or (2) participate, to the extent possible, in other *pro bono* service activities that directly relate to the legal needs of the poor. This professional responsibility does not apply to members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory, rule or regulatory prohibitions [ ].[1]

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[1] Also exempt are retired, inactive and suspended Bar members. Schwarz does not challenge the appropriateness of an exemption for these categories of Florida lawyers.

Section (b) of the Rule provides a critical gloss on this provision, by making clear that the obligation recognized by section (a) is "*aspirational* rather than mandatory in nature," and therefore "failure to fulfill one's professional responsibility under this rule will not subject a lawyer to discipline" (emphasis in original). Nevertheless, section (b) goes on to state that compliance with section (a) may be established in one of two ways: through the annual provision of 20 hours of *pro bono* legal services to the poor, or an annual contribution of $350 to a legal aid organization.

The crux of this appeal is section (d) of the Rule, which requires Florida Bar members to report, in conjunction with their annual dues statement, whether they have complied with the aspirational goals of section (a) or, in the alternative, qualify for an exemption. Specifically, section (d) begins by stating that "[e]ach member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide *pro bono* legal services to the poor." It then explains that "[e]ach member shall report this information through a simplified reporting form that is made part of the member's annual dues statement." The form contains the following inquiries, at least one of which must be answered or highlighted by the member:

> (1) I have personally provided hours of *pro bono* legal services;
>
> (2) I have provided *pro bono* legal services collectively by: (indicate type of case and manner in which service was provided;
>
> (3) I have contributed to: (indicate organization to which funds were provided);
>
> (4) I have provided legal services to the poor in the following special manner: (indicate manner in which services were provided); or

(5) I have been unable to provide *pro bono* legal services to the poor this year; or

(6) I am deferred from the provision of *pro bono* legal services to the poor because I am: (indicate whether lawyer is: a member of the judiciary or judicial staff; a government lawyer prohibited by statute, rule or regulation from providing services; retired or inactive).

While a Bar member's failure, or unwillingness, to honor the aspirational *pro bono* goals in the manner prescribed in section (b) will not expose him to professional discipline, failure to comply with the reporting requirement "shall constitute a disciplinary offense under these rules" and may trigger professional discipline by the Florida Supreme Court. Precisely what discipline the lawyer may face is unclear, since no lawyer has actually been sanctioned for violating Rule 4-6.1. A Bar member's report of his compliance or non-compliance with the aspirational goals of the Rule can be reviewed, upon request, by the public.

In May of 1994, Schwarz filed a petition with the Florida Supreme Court asking that the *pro bono* rule be stayed and then revoked. The petition, in two instances, referred to Rule 1-12.1 of the Rules Regulating the Florida Bar. Then-Chief Justice Grimes directed that the petition be returned without filing. The Appellant was notified of this ruling through a letter signed by the Clerk of the Court; the letter, dated May 24, 1994, advised Schwarz that he "must comply with Rule 1-12.1(f)" of the Rules Regulating the Florida Bar before the petition would be considered. Rule 1-12.1(f), among other things, states that "[o]nly the Supreme Court of Florida shall have the authority to amend" the Rules Regulating the Florida Bar. Rule 1-12.1(f) also creates certain procedural hurdles that must be cleared before a petition seeking the amendment of a Rule will be considered by the Florida Supreme Court. A petition may, for example, be filed only by the board of governors of the Florida Bar, or by 50 members in good standing so long as the proposed amendment

is submitted beforehand to the Bar. Subsection (i), though, contains a proviso stating that "[o]n good cause shown, the [Florida Supreme Court] may waive any or all of the provisions of [Rule 1-12.1]."

With his petition rejected, Schwarz, in June of 1994, filed this lawsuit pursuant to 42 U.S.C. § 1983 in the Southern District of Florida (the case was later transferred to the Northern District of Florida). The district court granted a motion to intervene by the Florida Bar Foundation, and eventually substituted the current Chief Justice of the Florida Supreme Court (Kogan) for the former Chief Justice and original Defendant (Grimes). Schwarz sought preliminary injunctive relief precluding the Florida Supreme Court from disciplining any Bar member who failed to comply with the reporting requirement created by Rule 4-6.1(d). The Appellees, however, agreed to refrain from initiating disciplinary action for non-compliance with the reporting requirement during the pendency of this lawsuit. On March 10, 1995, the presiding district judge denied Schwarz's motion to disqualify "all sitting District Judges and Magistrates serving in the United States District Court for the Northern District of Florida" from hearing the case. The motion was premised on the argument that judges who are also Florida Bar members have a "direct personal, professional, and financial interest in the outcome of this cause." The parties subsequently filed cross-motions for summary judgment based upon a largely stipulated record. The summary judgment motions were referred to the assigned United States Magistrate Judge, who, on December 15, 1995, issued a lengthy report and recommendation. The magistrate judge recommended that the Appellees' motion be granted and the Appellant's motion be denied. Schwarz filed objections to the report; on August 9, 1996, however, the district court entered a brief order adopting the magistrate's recommendations and overruling the Appellant's objections. Judgment was entered on August 12, 1996.

After this appeal was docketed, the Florida Supreme Court issued a *per curiam* opinion rejecting certain amendments to Rule 4-6.1 proposed by the Florida Bar. *Amendments to Rule 4-6.1 of Rules Regulating The Florida Bar — Pro Bono Public Service,* 696 So.2d 734 (Fla. 1997). The opinion, dated May 22, 1997, denied the Bar's application to amend the Rule by replacing the mandatory reporting requirement with a provision that would have made reporting largely voluntary. Schwarz, the Appellant here, is identified as one of the counsel of record for those arguing in favor of dropping the reporting requirement.

On appeal, Schwarz raises only some of the argument he presented to the district court. He asserts that the reporting requirement of Rule 4-6.1(d) converts the aspirational goals of section (a) into a mandatory component of Bar membership, thereby making the Rule unconstitutional under this Circuit's substantive due process and equal protection jurisprudence. He also contends that the Rule amounts to an unconstitutional taking of his private property, and insists that the Florida Supreme Court denied him a constitutional right of access to courts by rejecting the petition that he submitted in May of 1994. In addition, Schwarz renews his argument that federal judges who are Florida Bar members and are exempt from Rule 4-6.1's aspirational *pro bono* goals should be disqualified from hearing this lawsuit.

II.

[1] The parties agree on the appropriate standards of review. A district judge's refusal to disqualify himself is reviewed for abuse of discretion. *United States v. Kelly,* 888 F.2d 721, 745 (11th Cir. 1989). All other issues in this appeal are questions of law that must be considered *de novo. See, e.g., United States v. Johns,* 984 F.2d 1162, 1163 (11th Cir. 1993). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

III.

[2, 3] We begin our analysis of Schwarz's constitutional arguments (the only arguments that warrant any meaningful discussion) by addressing his apparent view that Rule 4-6.1, on its face, denies him rights guaranteed by the Due Process clause of the Fourteenth Amendment. Substantive due process challenges that do not implicate fundamental rights are reviewed under the highly deferential "rational basis" standard. *See, e.g., TRM, Inc. v. United States,* 52 F.2d 941, 945 (11th Cir. 1995).[2] In order to survive this minimal scrutiny, the challenged provision need only be rationally related to a legitimate government purpose. *Id.* (citing *Silver v. Baggiano,* 804 F.2d 1211, 1218 (11th Cir. 1986)). In other words, if there is any conceivably valid justification for Rule 4-6.1, and if there is any plausible link between the purpose of the Rule and the methods selected to further this purpose, then no violation of substantive due process exists. *See, e.g., id.*

The Florida Supreme Court undoubtedly has a legitimate interest in encouraging the attorneys it has licensed to practice in the State of Florida to perform *pro bono* legal services as one aspect of their professional responsibility. We have recognized

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[2] Although Schwarz suggests in passing that we apply the more demanding "strict scrutiny" test to our examination of Rule 4-6.1, he provides absolutely no support for his position. Indeed, this Circuit has indicated that there is no fundamental right to practice law, let alone to practice law free of any obligation to provide *pro bono* legal services to the poor. *See, e.g., Kirkpatrick v. Shaw,* 70 F.3d 100, 103 (11th Cir. 1995) (*per curiam*) (holding that rational basis is the appropriate standard for classifications affecting the admission of applicants to the bar); *Jones v. Board of Commissioners,* 737 F.2d 996, 1000-01 (11th Cir.) (same finding with respect to equal protection and substantive due process challenges to rules limiting the number of times an applicant could sit for the bar), *reh'g denied,* 745 F.2d 72 (1984).

that states have an "especially great" interest in regulating lawyers, since "'lawyers are essential to the primary government function of administering justice.'" *Kirkpatrick,* 70 F.3d at 103 (citation omitted). Due to the unique and important role of the legal professional in this country, the free provision of legal services to the poor has long been recognized as an essential component of the practice of law. In *Waters v. Kemp,* 845 F.2d 260, 263 (11th Cir. 1988), for example, this Circuit emphasized that one of the traditions of the legal profession is that a lawyer, as an officer of the court, is "obligated to represent indigents for little or no compensation upon court order." *Accord, United States v. Accetturo,* 842 F.2d 1408, 1412-13 (3rd Cir. 1988). Similarly, in *Mallard v. United States District Court,* 490 U.S. 296, 310, 109 S.Ct. 1814, 1823, 194 L.Ed.2d 318 (1989), the Court commented that at a "time when the need for legal services is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest." The Florida Supreme Court, when it approved the drafting of what became Rule 4-6.1, acknowledged precisely these points, finding it "important for an independent legal profession to provide a portion of indigent representation to ensure proper challenge against government violations of individual rights," as well as to ensure that basic legal representation is available to "all segments of society." *In re Amendments to Rules Regulating the Florida Bar,* 598 So.2d 41, 43 (Fla. 1992). More recently, the court justified its retention of the reporting requirement in part by observing that "[l]awyers have been granted a special boon by the State of Florida — they in effect have a monopoly on the public justice system. In return, lawyers are ethically bound to help the State's poor gain access to that system." 696 So.2d at 735.

There is plainly an adequate nexus between the establishment of aspirational *pro bono* goals for members of the Florida Bar and the Florida Supreme Court's legitimate interest in encouraging Bar members to provide legal services to the indigent.

Schwarz does not, and cannot, dispute that there is a powerful, documented need to broaden and improve the scope of legal representation available to the poor. The choice of a not terribly onerous goal of twenty hours of *pro bono* service per year advances the Florida Supreme Court's interest in at least two ways. It supplies individual Bar member with a benchmark for evaluating how many hours of *pro bono* work they should be performing, while at the same time suggesting that a lawyer's professional responsibility to perform legal services for the poor may easily be integrated with other tasks that draw on an attorney's time and energy.

Schwarz, nevertheless insists that permitting Bar members to comply with their professional responsibility by making a financial contribution to a legal aid society, instead of personally or collectively performing tangible legal services, makes the Rule arbitrary and capricious. We disagree. It was *rational* for the Florida Supreme Court to conclude that, since some attorneys inevitably will not or cannot devote twenty hours to *pro bono* legal work, giving these attorneys the option of satisfying their professional responsibility by donating funds to a legal services organization — under circumstances where they might otherwise do nothing — both maintains respect for the Rule and furthers its ultimate purpose of increasing the availability of legal services to the poor. Moreover, the selection of $350 as the appropriate amount was not irrational, since a larger amount might discourage voluntary contributions or encourage a perception that this provision benefits only wealthy attorneys. There are, admittedly, reasonable arguments against this aspect of the Rule. *See, e.g.,* 630 So.2d at 506 (Barkett, J., specially concurring) (suggesting as "inherent inequality when those who cannot pay are asked to provide twenty hours of work, and those with money can 'buy out' for the value of a few hours"). Our task, however, is not to evaluate whether the justifications for this portion of the Rule are more or less persuasive than any arguments to the contrary; we may ask only if there is a "conceivable

basis" for allowing Bar members to substitute a legal aid contribution of $350 for a donation of legal services. There is an entirely rational basis for this provision, especially since nothing in the Rule requires Bar members to donate either time *or* money to the indigent.

We also conclude that there is a constitutionally sound basis for expecting Bar members to report their compliance with the Rule's aspirational goals. In its opinion approving Rule 4-6.1, the Florida Supreme Court, explained that it believed "accurate reporting is essential for evaluating th[e *pro bono*] program . . . [and] determin[ing] the areas in which the legal needs of the poor are or are not being met." 630 So.2d at 502-03. In its recent opinion rejecting amendments that would have eliminated the reporting requirement, the court again emphasized that "accurate reporting is essential for evaluating the delivery of legal services to the poor and for determining where such services are not being provided." 696 So.2d at 735. Indeed, said the court, "[t]here is no more effective way to gauge the success of lawyers in meeting their obligation to represent the poor — an obligation every member of the Bar swears to undertake." *Id.* It was rational for the Florida Supreme Court to conclude that requiring Bar members to report their compliance with the Rule's aspirational *pro bono* goals both encourages lawyers to honor these goals and provides the Court with a pool of information that might lend some insight into what, if any, additional measures are needed to help the poor obtain counsel and secure access to the courts.

Schwarz nevertheless contends that the reporting requirement fails to withstand rationality review, because the effect of this requirement is to convert the aspirational goals of sections (a) and (b) into mandatory obligations for most Bar members. In essence, Schwarz contends that, since a failure to perform *pro bono* legal services or contribute to a legal aid society must be reported to the Florida Supreme Court, and this information, in turn, must be made available to the Bar and the public, private

lawyers are implicitly coerced into satisfying the Rule's aspirations in order to preserve their professional "honor" and ability to climb the professional and political ladder. There are several clear flaws with this argument. To begin with, Schwarz has not established a persuasive evidentiary foundation for his speculation that Bar members, in order to avoid the possibility of social and professional scorn, have been compelled to do what they otherwise lack the time, inclination or resources to do. Neither section (d) nor any other provision in Rule 4-6.1 makes a Florida lawyer's non-compliance with the aspirational goals outlined in sections (a) and (b) a basis for professional discipline. And even assuming that the reporting requirement may have some implicit coercive effect, and thereby motivates otherwise reluctant lawyers to honor their professional responsibility, this results justifiably furthers the Rule's legitimate purpose.[3] The Florida Supreme Court expressly considered and rejected Schwarz's "peer pressure" argument at the time it adopted Rule 4-6.1, *see* 630 So.2d at 505, and the explanations set forth in that ruling, and reiterated before us now, are constitutionally adequate.

[4, 5] Schwarz's next argument is that the exemption for judges, their staff and certain government lawyers in Rule 4-6.1(a) violates the Equal Protection clause. Equal Protection challenges that do not implicate certain fundamental rights or concern "suspect classifications" are subject only to the same rational basis analysis used for most substantive due process claims. *See, e.g., TRM,* 52 F.3d at 945; *Haves v. City of Miami,* 52 F.3d 918, 921 (11th Cir. 1995). The Florida Supreme Court's disparate treatment of certain categories of Florida Bar members, therefore, withstands minimal scrutiny if "'any state of

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[3] Of course, while compliance with Rule 4-6.1(d) is required in the sense that "failure to report this information shall constitute a disciplinary offense under [the Rules Regulating the Florida Bar]," it is unclear, on this record, what, if any, sanctions might befall a Bar member who elects not to supply the requested information.

facts reasonably may be conceived to justify it.'" *D.W. v. Rogers*, 113 F.3d 1214, 1219 (11th Cir. 1997) (citation omitted).

Schwarz contends that exempting judges, their staff and government lawyers "who are prohibited from performing legal services by constitutional, statutory, rule or regulatory prohibitions" from the Rule's aspirational goals, while applying these goals to other Bar members who are not retired, inactive or suspended, is arbitrary and capricious.[4] This argument must fail. As the Florida Supreme Court explained in its opinion adopting Rule 4-6.1, there are clear ethical constraints on the ability of judges and law clerks who are Florida Bar members to engage in the practice of law. 630 So.2d at 503 (listing provisions in the Florida Constitution, the Code of Judicial Conduct adopted by the Florida Supreme Court and the state's Rules of Judicial Administration that prohibit or restrict the practice of law by judges and clerks); *see also* Committee on Codes of Conduct, Judicial Conference of the United States, Code of Conduct for United States Judges, Canon 5(f) (March, 1997) (stating that "[a] judge should not practice law"). The court explained that "[t]hese prohibitions are designed partially to prevent judges and their staffs from taking time away from their judicial duties [but more importantly] to prevent them from placing themselves in positions where their actions could directly be influenced by matters that could come before them or could provide the appearance that certain parties might be favored over others." 630 So.2d at 503-04. Accordingly, rather than place these individuals in a position where they had to navigate between conflicting ethical obligations and likely decide against honoring the Rule, the court *rationally* concluded that the wiser course was to exempt these

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[4] Section (a) of Rule 4-6.1 states that the professional responsibility recognized by the Rule "does not apply" to these individuals, although in its opinion adopting the Rule, the Florida Supreme Court indicated that it was merely deferring the obligation of these individuals to participate in the *pro bono* program. 630 So.2d at 504.

individuals from the Rule's aspirational goals and concentrate instead on encouraging full compliance by private lawyers. The court found that myriad ethical constraints, as well as the "limited availability of staff and lack of malpractice insurance," also affected the ability of government attorneys to honor the Rule's aspirational goals. Even so, the Rule approved by the court does not state that *all* government lawyers are exempt; rather, only those government lawyers who are "prohibited" from providing legal services are relieved of an obligation to aspire to perform twenty hours of *pro bono* or contribute $350 to a legal aid society. We certainly cannot say that the Florida Supreme Court's decision to defer this limited group of Florida Bar members from the professional responsibility defined in section (a) was irrational.

Schwarz contends that, at the very least, it was irrational for the court not to have required judges and their clerks, let alone government attorneys, to "aspire" to make an annual $350 contribution to a legal aid group. We are unpersuaded. The same concerns that underlie the prohibitions on the private practice of law by these individuals may caution against encouraging them to contribute money to organizations servicing the legal needs of indigents and representing the poor in litigation. *See, e.g.,* Code of Conduct for United States Judges, Canon 5(C)(1) ("A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties . . . or involve the judge in frequent transactions with lawyers or other persons likely to come before the court in which the judge serves"). While the Florida Supreme Court might well have broadened the types of activities listed in section (b) of the Rule in order to encompass activities that advance the principles of *pro bono* service without running afoul of the ethical and practical constraints on judges and government attorneys eager to further these principles, surely there exists a rational basis for the court's conclusion that the overall interest of the Bar, and the indigent, were best served

by limiting the ways in which non-exempt Bar members might satisfy their professional responsibility. Consequently, the Florida Supreme Court's decision to "defer" members of the judiciary, their staffs and some, but not all, government lawyers from the aspirational goals of Rule 4-6.1 easily survives Schwarz's equal protection and substantive due process objections.

IV.

[6-8] In short, we conclude that the district court properly granted the Appellees' motion for summary judgment and properly rejected the cross-motion filed by Schwarz. Rule 4-6.1 of the Rules Regulating the Florida Bar withstands minimal scrutiny under this Circuit's substantive due process and equal protection jurisprudence, and the Appellant's other arguments merit little discussion.[5] Accordingly, the judgment of the district court must be, and is,

AFFIRMED.

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[5] Schwarz maintains that the Florida Supreme Court denied him a right of "access to courts" guaranteed by the Fourteenth Amendment when the Clerk of that court returned his petition to eliminate the reporting requirement of Rule 4-6.1. The petition, says Schwarz, presented state and federal constitutional arguments against the Rule, and sought to invoke the court's adjudicatory as opposed to rule-making powers. According to Schwarz, the court mistakenly treated the petition as one seeking to amend the Rule, and in so doing deprived him of a right to litigate his constitutional objections in a Florida, as opposed to federal, proceeding.

It is far from clear that Schwarz sought to invoke the Florida Supreme Court's adjudicative powers. The petition, among other things, expressly referred to Rule 1-12 (which governs amendments to the Rules Regulating the Florida Bar), and sought "revocation" of the rule rather than declaratory or injunctive relief. But even assuming that the court erred in its application of Rule 1-12 to the petition, there is another more fundamental flaw in the Appellant's position. To be specific, he has made no showing that then-Chief Justice Grimes completely and unequivocally denied him his ability to pursue

(Footnote 5 continued on next page)

(Footnote 5 continued)

in the Florida courts a constitutional challenge to enforceability of Rule 4-6.1. Although the Appellees take the position that the Florida Supreme Court is the only Florida tribunal that might have jurisdiction to consider a facial constitutional attack on a rule propounded by that body, *see* Appellees' Brief, at 17 (citing *State v. McCall,* 301 So.2d 774, 775 (Fla. 1974)), they insist that Schwarz could have sought to invoke the court's authority to issue writs. They observe that section 3(b)(7) of Article V of the Florida Constitution gives the court jurisdiction over petitions for "all writs necessary to complete exercise of its jurisdiction." In *State ex rel. Chiles v. Public Employees Relations Commission,* 630 So.2d 1093 (Fla. 1994), a case which arose out of an attempt to secure a writ prohibiting the certification of a bargaining unit for state-employed attorneys, the court emphasized that the state constitution "vests [us] with the 'exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of person admitted,'" and accordingly "[b]ecause the regulation of attorneys falls within the Court's ultimate power of review, the all writs clause could arguably be invoked as a basis for this Court's jurisdiction" over the lawsuit. *Id.* at 1095. In light of this language, and the pertinent provisions of the state constitution, it cannot be said that it would have been wholly futile for Schwarz to have attempted to invoke the Florida Supreme Court's original jurisdiction. Moreover, it is possible that, had Schwarz subsequently filed a petition that complied with Rule 1-12, or at least sought a waiver of the procedural limitation of that Rule, the court might have addressed his constitutional arguments wearing its "adjudicatory" hat as well as, or in lieu of, its "rule-making" hat. What seems clear, therefore, is that the rejection of the petition filed by Schwarz in May of 1994 does not, standing alone, support the proposition that any constitutional right of access to the courts has been infringed. It is also worth noting that the Florida Supreme Court recently considered both state and federal constitutional arguments against the reporting requirement in its opinion rejecting the Bar's proposal to amend this portion of the Rule. 696 So.2d at 735.

Schwarz's next suggestion that Rule 4-6.1 amounts to a taking of his property without just compensation, in violation of the Fifth and Fourteenth Amendments, is equally unavailing, for any number of reasons. Among other things, the Rule plainly does not "take" the property of Florida Bar members; compliance with the aspirational *pro bono* goals set out in section (b) is altogether voluntary. *See Cone v. State Bar of Florida,* 819 F.2d 1002, 1007 (11th Cir.) (sustaining Florida Bar's IOTA program against a Taking Clause challenge since "there was no taking of any property of the plaintiff"), *cert.*

(Footnote 5 continued on next page)

(Footnote 5 continued)

denied, 484 U.S. 917, 108 S.Ct. 268, 98 L.Ed.2d 225 (1987). Moreover, even if Schwarz could frame a viable takings challenge on this record (and he plainly cannot), he has failed to establish that he has exhausted whatever state remedies that might be available to him. *See Bickerstaff Clay Products Co., Inc. v. Harris County,* 89 F.3d 1481, 1490-91 (11th Cir. 1996) (discussing the ripeness requirement for Takings Clause claims).

Finally, we are not persuaded by the Appellant's argument that all federal judges who are members of the Florida Bar and are "deferred" from the aspirational *pro bono* goals of Rule 4-6.1 must disqualify themselves from hearing this lawsuit. Section 455 of Title 28 of the United States Code describes the circumstances where federal judges or magistrates "shall" recuse themselves. Section 455(a) provides that judges shall disqualify themselves "in any proceeding in which [their] impartiality might reasonably be questioned." *See Parker v. Connors Steel Co.,* 855 F.2d 1510, 1524 (11th Cir. 1988), *cert. denied,* 490 U.S. 1066, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989). Section 455(b) adds that disqualification is required when the judge "knows that he . . . has a financial interest in the subject matter in controversy . . . or any other interest that could be substantially affected by the outcome of the proceeding." Schwarz insists that federal judges and magistrates who are Florida Bar members have a "personal and professional" stake in preserving the exemption that the Florida Supreme Court has, at least temporarily, carved out for them. Schwarz also asserts that members of the judiciary have a direct financial interest in preserving the exemption, since the Rule effectively relives judges of any obligation to perform 20 hours of *pro bono* work or contribute $350 to a legal aid society. But judges, like other Florida Bar members, are not obliged to provide any *pro bono* services or contribute any money to legal aid groups. Nor do judges have a meaningful "professional" interest in preserving the language of the Rule, since accepted canons of judicial conduct would continue to constrain the ability of judges to honor the Florida Supreme Court's aspirational goals even if members of the judiciary were required to disclose their non-compliance.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-

THOMAS ROWE SCHWARZ,
Plaintiff,

vs.

HONORABLE STEPHEN H. GRIMES,
Chief Justice of the Florida Supreme Court,
Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTION

COMES NOW THOMAS ROWE SCHWARZ (hereinafter "Plaintiff") and complains that:

I.

This is an action for declaratory and injunctive relief arising out of deprivation of plaintiff's rights by the Honorable STEPHEN H. GRIMES, Chief Justice of the Florida Supreme Court (hereinafter "Defendant"), under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

II.

Jurisdiction of the cause in this Court is grounded in 28 U.S.C.A., Section 1343, and 42 U.S.C.A., Section 1983.

III.

a) Plaintiff is a resident of Broward County, Florida, and is an attorney licensed by the Florida Supreme Court to practice law under License Number 129383.

b) The things and actions complained of, and the deprivation of rights of the plaintiff, occurred in Broward County, Florida within the province of the United States District Court in and for the Southern District of Florida.

IV.

Defendant is Chief Justice of the Florida Supreme Court and, as such, its chief administrative officer.

V.

The Florida Supreme Court exercises its administrative powers to license and regulate the conduct of law licensees under a set of regulations which it has entitled "Rules Regulating The Florida Bar" (hereinafter "Rules"), and has created an entity styled "The Florida Bar" to which all licensees are required to belong.

VI.

Under the Rules Regulating The Florida Bar, the Florida Supreme Court declares that it retains sole and exclusive jurisdiction over the same, with certain limited exceptions not applicable to this action.

VII.

Pursuant to the Florida Supreme Court's reservation of exclusive jurisdiction over the Rules the plaintiff, prior to May 20, 1994 transmitted to the Honorable Sid J. White, the Clerk of said court (hereinafter "White"), an ex parte petition alleging that Rule 4.6.Public Service and Rule 1-12.Amendments, of the Rules Regulating The Florida Bar, violated the constitutional rights of plaintiff under provisions of the United States and Florida Constitutions. The said Rules 4-6.Public Service, and 1-12.Amendments, are attached hereto and made part hereof as Exhibit "A".

VIII.

The foregoing petition was received in the offices of White on or about May 20, 1994. It is attached hereto and made a part hereof as Exhibit "B".

IX.

In summary, the Exhibit "B" petition sought suspension and revocation of said Rules 4-6.Public Service and 1-12.Amendments, on grounds that:

a/ Rule 4-6.Public Service subjects plaintiff to public and professional contumely, and further subjects him to threat of license discipline and deprivation of property unless he provides private charity as selected by the Florida Supreme Court, invading his privacy by requiring publication of his private papers and activities.

b/ Rule 1-12.Amendments provides that, while retaining exclusive jurisdiction over the subject matter of its Rules, the Florida Supreme Court refuses to consider complaints that such Rules violate the constitutional rights of its licensees unless the individual complainant obtains the joinder of at least an additional forty-nine allies.

X.

In the execution of his power as Chief Justice in relation to internal court administration of the Florida Supreme Court, defendant Grimes without notice, hearing and, insofar as appears, without any written order, directed White not to file the plaintiff's Exhibit "B" petition and to further advise that the Florida Supreme Court would not consider the same without the joinder of at least forty-nine additional complainant/petitioners. (Exhibit "C", attached hereto and made part hereof).

XI.

The great bulk of law licensees subject to the Rules Regulating The Florida Bar and having an interest in the subject matter of this action , are resident of and in practice in the territorial jurisdiction of the United States District Court for the Southern District of Florida.

XII.

The administrative action of defendant Grimes and his informal direction to White without notice, hearing, or written order that the Florida Supreme Court will not consider that its Rules violate the individual constitutional rights of licensees under the United States Constitution, has left plaintiff without legal remedy while his rights continue to be violated, and subjects hi to irreparable damage unless this Court exercise its proper jurisdiction in the matter and declares:

a/ That the direction of defendant Grimes to White and its sequelae, constitutes an unlawful infringement of plaintiff's Federal constitutional rights;

b/ That Rule 1-12. Amendments, of the Rules Regulating The Florida Bar, is an unconstitutional infringement of plaintiff's Federal constitutional rights and those of all other law licensees of the Florida Supreme Court, and that it is void and of no effect, and enjoin its enforcement;

c/ That Rule 4-6.Public Service, of the Rules Regulating The Florida Bar, is an unconstitutional infringement of plaintiff's Federal constitutional rights and those of all other law licensees of the Florida Supreme Court, and enjoin its enforcement;

d/ Award to plaintiff his costs and attorneys' fees herein, and grant such order and further relief as to the Court may seem meet and proper in the premises.

THOMAS ROWE SCHWARZ
Plaintiff
4561 N.W. 79th Avenue
Lauderhill, FL 33351
Ph: (305) 742-6979

By: _____
Thomas Rowe Schwarz

EXHIBIT "A"

4.6. PUBLIC SERVICE
RULE 4-6.1 PRO BONO PUBLIC SERVICE

(a) Professional Responsibility. Each member of The Florida Bar in good standing, as part of that member's professional responsibility, should (1) render pro bono legal services to the poor or (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor. This professional responsibility does not apply to members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, or regulatory prohibitions. Neither does this professional responsibility apply to those members of the bar who are retired, inactive, or suspended, or who have been placed on the inactive list for incapacity not related to discipline.

(b) Discharge of the Professional Responsibility to Provide Pro Bono Legal Services to the Poor. The professional responsibility to provide pro bono legal services as established under this rule is aspirational rather than mandatory in nature. The failure to fulfill one's professional responsibility under this rule will not subject a lawyer to discipline. The professional responsibility to provide pro bono legal services to the poor may be discharged by:

(1) annually providing at least 20 hours of pro bono legal service to the poor; or

(2) making an annual contribution of at least $350 to a legal aid organization.

(c) Collective Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor. Each member of the bar should strive to individually satisfy the member's professional responsibility to provide pro bono legal services to the poor. Collective satisfaction of the professional responsibility is

permitted by law firms only under a collective satisfaction plan that has been filed previously with the circuit pro bono committee and only when providing pro bono legal service to the poor.

(1) in a major case or matter involving a substantial expenditure of time and resources; or

(2) through a full-time community or public service staff; or

(3) in any other manner that has been approved by the circuit pro bono committee in the circuit in which the firm practices.

(d) Reporting Requirement. Each member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor. Each member shall report this information through a simplified reporting form that is made a part of the member's annual dues statement. The form will contain the following categories from which each member will be allowed to choose in reporting whether the member has provided pro bono legal services to the poor:

(1) I have personally provided ___ hours of pro bono legal services;

(2) I have provided pro bono legal services collectively by: (indicate type of case and manner in which service was provided);

(3) I have contributed $_____ to: (indicate organization to which funds were provided); or

(4) I have provided legal services to the poor in the following special manner: (indicate manner in which services were provided); or

(5) I have been unable to provide pro bono legal services to the poor this year; or

(6) I am deferred from the provision of pro bono legal services to the poor because I am: (indicate whether lawyer is: a member of the judiciary or judicial staff; a government lawyer prohibited by statute, rule, or regulation from providing services; retired; or inactive).

The failure to report this information shall constitute a disciplinary offense under these rules.

(e) Credit Toward Professional Responsibility in Future Years. In the event that more than 20 hours of pro bono legal service to the poor are provided and reported in any 1 year, the hours in excess of 20 hours may be carried forward and reported as such for up to 2 succeeding years for the purpose of determining whether a lawyer has fulfilled the professional responsibility to provide pro bono legal service to the poor in those succeeding years.

(f) Out-of-State Members of the Bar. Out-of-state members of the bar may fulfill their professional responsibility in the states in which they practice or reside.

Comment

Pro bono legal service to the poor is an integral and particular way of a lawyer's pro bono public service responsibility. As our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance. This is true for all people, be they rich, poor, or of moderate means. However, because the legal problems of the poor often involve areas of basic need, their inability to obtain legal services can have dire consequences. The vast unmet legal needs of the poor in Florida have been recognized by the Supreme Court of Florida over the past two decades. The Supreme Court of Florida has further recognized the necessity of finding a solution to the problem of providing

the poor greater access to legal service and the unique role of lawyers in our adversarial system of representing and defending persons against the actions and conduct of governmental entities, individuals, and non-governmental entities. As an officer of the court, each member of the Florida Bar in good standing has a professional responsibility to provide pro bono legal service to the poor. Certain lawyers, however, are prohibited from performing legal services by constitutional, statutory, rule, or regulatory prohibitions, members of the bar who are retired, inactive, or suspended, or who have been placed on the inactive list for incapacity not related to discipline are deferred from participation in this program.

In discharging the professional responsibility to provide pro bono legal service to the poor, each lawyer should furnish a minimum of twenty hours of pro bono legal service to the poor annually or contribute $350 to a legal aid organization. Pro bono legal service to the poor is to be provided not only to those persons whose household incomes are below the federal poverty standard but also to those persons frequently referred to as the "working poor." Lawyers providing pro bono legal service on their own need not undertake an investigation to determine client eligibility. Rather, a good faith determination by the lawyer of client eligibility is sufficient. Pro bono legal service to the poor need not be provided only through free legal services to individuals; it can also be provided through free legal services to charitable, religious, or educational organizations whose overall mission and activities are designed predominately to address the needs of the poor. For example, free legal services to organizations such as a church, civic, or community service organization relating to a project seeking to address the problems of the poor would qualify.

While the personal involvement of each lawyer in the provision of pro bono legal service to the poor is generally preferable, such personal involvement may not always be possible or produce the ultimate desired results, this is, a significant maximum increase in the quantity and quality of legal service provided to the poor. The annual contribution alternative recognizes a lawyer's professional responsibility to provide financial assistance to increase and improve the delivery of legal services to the poor when a lawyer cannot or decides not to provide legal service to the poor through the contribution of time. Also, there is no prohibition against a lawyer contributing a combination of hours and financial support. The limited provision allowing for collective satisfaction of the 20-hour standard recognizes the importance of encouraging law firms to undertake the pro bono legal representation of the poor is substantial, complex matter requiring significant expenditures of law firm resources and time and costs, such as class actions and post-conviction death penalty appeal cases, and through the establishment of full-time community or public service staffs. When a law firm uses collective satisfaction, the total hours of legal services provided in such substantial, complex matters or through a full-time community or public service staff should be credited among the firm's lawyers in a fair and reasonable manner as determined by the firm.

The reporting requirement is designed to provide a sound basis for evaluating the results achieved by this rule, reveal the strengths and weaknesses of the pro bono plan, and to remind lawyers of their professional responsibility under this rule.

The 20-hour standard for the provision of pro bono legal services to the poor is a minimum. Additional hours of pro bono legal services are to be encouraged. Many lawyers will, as they have before the adoption of this rule, contribute

many more hours than the minimum. To ensure that a lawyer may, if the lawyer chooses, receive credit for future years for the time that may be required to handle a particularly involved matter, this rule provides the lawyer an opportunity to carry forward the lawyer's time provided in excess of 20 hours in any 1 year over 2 successive additional years.

EXHIBIT "B"

IN THE SUPREME COURT OF FLORIDA

Case No.

Ex Parte:

THOMAS ROWE SCHWARZ,
Petitioner,

PETITION TO REVOKE "RULE 4.6.PUBLIC SERVICE" OF THE RULES REGULATING THE FLORIDA BAR

[Filed: May 20, 1994]

COMES NOW THOMAS ROWE SCHWARZ, and complains to this Court that it has and is now to his injury and damage violating his constitutional rights and privileges, and petitions the Court for relief, all as ore particularly follows:

1/ Petitioner's right to access to the courts for redress of his injury is guaranteed under the Florida Constitution, Article I, Section 21. In particular, this Court has arrogated to itself under Rule 1-12,1(a) of the Rules Regulating The Florida Bar exclusive jurisdiction to remedy injury inflicted by Rule 4-6.Public Service, promulgated as part of such Rules.

2/ Petitioner is an attorney in good standing, licensed by the Court to practice and practicing law in the State of Florida, subject to the coercive powers of the Court against its law licensees exercising their privileges under such licenses by virtue of the Court's general administrative power to regulate the admission to and practice of law in the State of Florida.

3/ Pursuant to its purported administrative powers, this Court has adopted Rule 4-6.Public Service (Exhibit A hereto) as one of its Rules Regulating The Florida Bar, which Rule:

a) Embodies the means and has the purpose and intended effect of coercing licensees, including petitioner, into the perfor-

mance of private charity selected by the Court or its agents, or be declared unprofessional;

b) Subjects licensees to the Court's disciplinary powers for failure to report and publish their undertaking, or refusal to undertake, the Court's charity selected for them;

c) Provides arbitrary and capricious exemption buyouts without regard to individual service value as charged by licensees and recognized by this Court as community standards.

4/ The promulgation and implementation of Rule4-6.Public Service violates and infringes upon the constitutional rights of petitioner under:

A. The Florida Constitution:

1. Article I, Section 9, by depriving licensees of liberty and property without due process of law.

2. Article I, Sections 23 and 12, by requiring the publication of licensees' activity in private charity and their personal, private papers.

3. Article I, Section 18, as an administrative attempt to impose penalties not otherwise provided by law.

4. Article I, Section 9, by compelling petitioner to give evidence against himself in a matter declared by this Court to be quasi-criminal.

5. Article VII, Section 2, by creation of an unequal ad valorem tax on the license of petitioner.

B. The United States Constitution:

1. Article XIV, by denying equal protection and abridging the privilege of licensees and petitioner on an unequal basis.

2. Article IV, by intrusion upon the privacy of petitioner and his right to be secure in his person and papers.

3. Article V, by depriving petitioner of property and the fruit of his labor, and compelling him under threat of

quasi-criminal discipline to testify against himself.

5/ By promulgation of Rule 1-12(f)(g), this Court has and is attempting to deny petitioner his right individually to seek redress by the Court of violations of his constitutional rights, as set out herein.

6/ Under the implementation system created by Rule 3-6.Public Service, petitioner is required to report June 1, 1994 and subjects him to irreparable damage and contumely.

WHEREFORE petitioner prays that this Court:

a) Stay the implementation of Rule 4-6.Public Service of the Rules Regulating The Florida Bar, pending hearing in and decision of this cause;

b) Order the Clerk of this Court to issue process at the request of petitioner to compel the attendance of witnesses;

c) Upon hearing and consideration, revoke Rule 4-6.Public Service of the Rules Regulating The Florida Bar;

d) Award petitioner his costs, a reasonable fee, and damages;

e) Grant such other and further relief as may be meet and proper in the premises.

THOMAS ROWE SCHWARZ
Petitioner
4561 N.W. 79th Avenue
Lauderhill, FL 33351
Ph: (305) 742-6979
(Florida Bar No. 129383)

By: /s/ Thomas Rowe Schwarz
Thomas Rowe Schwarz

EXHIBIT "A" (continued)

1-12.AMENDMENTS
RULE 1-12.1 AMENDMENT TO RULES; AUTHORITY; NOTICE; PROCEDURES; COMMENTS

(a) Authority to Amend. The board of governors of The Florida Bar shall have the authority to amend chapters 6, schedule A, thereto and the standards for the individual area of certification; 7; and 9 of these Rules Regulating The Florida Bar, consistent with the notice, publication, and comments provided below. Only the Supreme Court of Florida shall have the authority to amend all other chapters of these Rules Regulating The Florida Bar.

(b) Proposed Amendments. Any member of The Florida Bar in good standing or a section or committee of The Florida Bar may request the board of governors to consider an amendment to these Rules Regulating The Florida Bar.

(c) Board Review of Proposed Amendments. The board of governors shall review proposed amendments by referral of the proposal to an appropriate committee thereof for substantive review. After substantive review, an appropriate committee of the board shall review the proposal for consistency with these rules and the policies of The Florida Bar. After completion of review, a recommendation concerning the proposal shall be made to the board.

(d) Notice of Proposed Board Action. Notice of the proposed action of the board on a proposed amendment shall be given in an edition of The Florida Bar News that is published prior to the meeting of the board at which the board action is taken. The notice shall identify the rule(s) to be amended and shall state in general terms the nature of the proposed amendments.

(e) Comments by Members. Any member may request a copy of the proposed amendments and may file written comments

concerning them. The comments shall be filed with the executive director sufficiently in advance of the board meeting to allow for copying and distribution to the members of the boards.

(f) Approval of Amendments. Amendments to other than chapters 7 and 9 of these Rules Regulating The Florida Bar shall be by petition to the Supreme Court of Florida. Petitions to amend these Rules Regulating The Florida Bar may be filed by the board of governors or by 50 members in good standing, provided that any amendments proposed by member of the bar shall be filed 90 days after filing them with The Florida Bar.

(g) Notice of Intent to File Petition. Notice of intent to file a petition to amend these Rules Regulating The Florida Bar shall be published in The Florida Bar News at least 30 days before the filing of the petition. The notice shall set forth the text of the proposed amendments, state the date the petition will be filed, and state that any comments or objections must be filed within 30 days of filing the petition. A copy of all comments or objections shall be served on the Executive Director of The Florida Bar and any persons who may have made an appearance in the matter.

(h) Action by the Supreme Court of Florida. The court shall review all proposed amendments filed under this rule and such amendments shall not become effective until an order is issued approving them. Final action of the court shall be reported in The Florida Bar News.

(i) Waiver. On good cause shown, the court may waive any or all of the provisions of this rule.

EXHIBIT "C"

SUPREME COURT OF FLORIDA
OFFICE OF THE CLERK
Tallahassee
32399-1927

Ph. (904) 488-0125

Sid J. White
Clerk

Debbie Causseaux
Chief Deputy Clerk

May 24, 1994

Mr. Thomas R. Schwarz
4561 Northwest 79th Avenue\
Lauderhill, Florida 33351

Re: PETITION TO REVOKE "RULE 4-6. PUBLIC SERVICE" OF THE RULES REGULATING THE FLORIDA BAR

Dear Mr. Schwarz:

Chief Justice Grimes has directed me to advise you that you must comply with Rule 1-12.1(f) before the Court will consider the above petition. Your petition is returned herewith.

Most cordially,

/s/ Sid J. White
Sid J. White

SJW:dec
Enclosure

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 94-40422-WS

THOMAS ROWE SCHWARZ,
Plaintiff,

vs.

HONORABLE STEPHEN H. GRIMES,
Chief Justice of the Florida Supreme Court,
Defendant.

MOTION FOR DISQUALIFICATION UNDER 28 U.S.C. 455(b)

The Plaintiff herein, THOMAS ROWE SCHWARZ, moves the Court for en banc consideration and entry of an order of disqualification of all sitting District Judges and Magistrates serving in the United States District Court for the Northern District of Florida. As grounds therefor the plaintiff says that:

Each such Judge and Magistrate has a direct personal, professional, and financial interest in the outcome of this cause. Under the provisions of 28 U.S.C., Section 455(b)(4), all such Judges and Magistrates are disqualified from hearing this cause, as more particularly appears from the affidavit of plaintiff attached hereto and made a part hereof.

The personal, professional, and financial interests of the said Judges and Magistrates rests upon the fact that all of the same are beneficiaries of a Florida state rule exemption underlying the plaintiff's claim of violation of his constitutional rights.

This motion is made timely, there having been no scheduling order or other order directing or limited the times for discovery, motions, or otherwise.

I HEREBY CERTIFY that a copy of the foregoing was served by mail, the December 9, 1994, upon Charlie McCoy, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Suite PL-01, Tallahassee, FL 32399-1050.

THOMAS R. SCHWARZ
4561 N.W. 79th Avenue
Lauderhill, FL 33351
Ph: (305) 742-6979
(Florida Bar No. 129383)

and

JOSEPH W. LITTLE
Co-Counsel
3731 N.W. 13th Place
Gainesville, FL 32605
Ph: (904) 392-2211

By: _____
Thomas R. Schwarz

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 94-40422-WS

THOMAS ROWE SCHWARZ,
Plaintiff,

vs.

HONORABLE STEPHEN H. GRIMES,
Chief Justice of the Florida Supreme Court,
Defendant.

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR DISQUALIFICATION

STATE OF FLORIDA)
) ss.
COUNTY OF BROWARD)

BEFORE ME, the undersigned authority, duly authorized to take statements and acknowledgments under oath, personally appeared THOMAS ROWE SCHWARZ, plaintiff in this cause, who upon being sworn says as follows:

1/ I am the plaintiff in the above styled cause, presently pending.

2/ The Judges of this Court, Maurice M. Paul, William Stafford, Roger Vinson, and Lacey A. Collier, and the Magistrates, Susan Novotny, William C. Sherrill, Jr., Richard A. Belz, and Larry Bodiford, are licensed by the Florida Supreme Court as active members of The Florida Bar. All Magistrates in the Northern District of this Court are required by 28 U.S.C., Section 631 to be licensed as attorneys by the Florida Supreme Court.

3/ The Florida Supreme Court promulgated Rule 4-6 of The Rules Regulating The Florida Bar, declaring that all licensees were under a professional, moral obligation to aid poor persons in their legal needs and that the moral obligation was fulfilled by providing twenty hours of direct legal services to such persons or contributing $350.00 to a legal aid organization. Reporting of moral rectitude or moral failure is required under Rule 4-6.1(d), and the failure to report is a disciplinary offense.

4/ Rule 4-6.1 of the said Rules Regulating The Florida Bar exempts judges, their staffs, certain government lawyers, and retired, inactive, and suspended Bar members from these moral responsibilities and reporting thereon.

5/ Such exemptions directly benefit the Judges and Magistrates of this District Court, and they are not available to other law licensees. The discrimination is one of the bases of plaintiff's claim that the impugned Rule, Rule 4-6, violates plaintiff's constitutional rights.

FURTHER YOUR AFFIANT SAYETH NOT . . . . .

THOMAS ROWE SCHWARZ
Affiant

SWORN TO AND SUBSCRIBED before me on December 9, 1994 at Lauderhill, Florida.

Notary Public

My Commission expires:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

THOMAS ROWE SCHWARZ

VS

CASE NO. TCA 94-40422-WS

HONORABLE STEPHEN H. GRIMES, Chief Justice of the Florida Supreme Court

REFERRAL AND ORDER

Referred to Judge William Stafford on 3/10/95

Motion/Pleadings: Motion for Disqualification Under 28 U.S.C. 455(b)

Filed by Plaintiff on 12/12/94 Doc.# 19

RESPONSES:

_____ on _____ Doc.#_____

_____ on _____ Doc.#_____

_____ Stipulated
_____ Unopposed

_____ Joint Pleading
_____ Consented

ROBERT A. MOSSING, CLERK

By_____
Deputy Clerk

_____
LC (1 or 2)

ORDER OF COURT

It is ORDERED this 10th day of March, 1995, the requested relief is denied.

William Stafford
WILLIAM STAFFORD, U.S. District Judge

U.S. DISTRICT CT.
NORTH DIST. FLA.
TALLAHASSEE, FLA.

1995 MAR 10 PM 3:35

FILED

ENTERED ON DOCKET 3/13/95 BY dlr
RULES 58 & 79(a) FRCP OR 32(b)(1) & 55 FRCRP

Copies Mailed to: Schwarz, McCoy, Sanford, Siegel

BEST AVAILABLE COPY

(Rev. 5/83)

JUDGMENT IN A CIVIL CASE

United States District Court	*Northern District of Florida*
Case Title: *THOMAS ROWE SCHWARZ,* *V.* *HONORABLE GERALD KOGAN,*	*Docket Number* *94cv40422-WS* *Name of Judge or Magistrate Judge* *WILLIAM STAFFORD*

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate judge) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT IN FAVOR OF THE DEFENDANT AND DEFENDANT-INTERVENOR

ROBERT A. MOSSING, CLERK	**August 12, 1996**
By Deputy Clerk: SHARON WILLIS	

ENTERED ON DOCKET August 12, 1996 BY
(Rules 58 & 79(a) FRCP or 32(b)(1) & 55 FRCRP)

Copies mailed to: Schwarz, Bucell, Sanders, McCoy

U.S. DISTRICT CT.
NORTH DIST., FLA.
TALLAHASSEE, FLA.

96 AUG 12 PM 3:00

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 94-40422-WS

THOMAS ROWE SCHWARZ,
Plaintiff,

vs.

HONORABLE GERALD KOGAN,
Defendant.

ORDER DIRECTING ENTRY OF JUDGMENT

[Filed: Aug. 9, 1996]

Before the court is the magistrate judge's report and recommendation docketed December 15, 1995. *See* Doc. 56. The magistrate judge recommends that the defendant's motion for summary judgment be granted and that the plaintiff's motion for summary judgment be denied.

The parties have been furnished copies of the report and recommendation and have been afforded an opportunity to file objections pursuant to Tile 28, United States Code, Section 636(b)(1). Upon *de novo* review of the record, including the plaintiff's objections to the report and recommendation, the court has determined that the recommendation should be adopted.

Accordingly, it is ORDERED:

1. Defendant's and Defendant-Intervenor's joint motion for summary judgment (doc. 47) is GRANTED.

2. Plaintiff's motion for summary judgment (doc. 52) is DENIED.

3. The clerk is directed to enter judgment in favor of the defendant and defendant-intervenor.

DONE AND ORDERED this 8th day of August, 1996.

/s/ William Stafford
William Stafford
Senior United States District Judge.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3276

THOMAS ROWE SCHWARZ,
Plaintiff-Appellant,

versus

GERALD KOGAN,
Defendant-Appellee,

FLORIDA BAR FOUNDATION,
Defendant-Intervenor-Appellee.

On Appeal from the United States District Court for the
Northern District of Florida

[Filed: Feb, 24, 1998]

BEFORE: TJOFLAT, BIRCH and MARCUS*, Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by appellant Thomas Rowe Schwarz is DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

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* Honorable Stanley Marcus was a U.S. District Judge of the Southern District of Florida sitting by designation as a member of this panel when this appeal was argued and taken under consideration. On November 24, 1997 he took the oath of office as a United States Circuit Judge of the Eleventh Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3276
District Court No. CV 94-40422

THOMAS ROWE SCHWARZ,
Plaintiff-Appellant,

versus

GERALD KOGAN,
Defendant-Appellee,

FLORIDA BAR FOUNDATION,
Defendant-Intervenor-Appellee.

Appeal from the United States District Court for the Northern District of Florida

[Filed: Jan. 12, 1998]

Before TJOFLAT, BIRCH and MARCUS*, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

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* Honorable Stanley Marcus was a U.S. District Judge of the Southern District of Florida sitting by designation as a member of this panel when this appeal was argued and taken under submission. On November 24, 1997 he took the oath of office as a United States Circuit Judge of the Eleventh Circuit.

It is further ordered that plaintiff-appellant pay to defendant-intervenor-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 12, 1998

For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/16/98